No. 92-135

MOTION FILED
SEP 4 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH SAN FILIPPO,

Petitioner,

vs.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as member of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER AND MOTION FOR LEAVE TO FILE THE BRIEF

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutgers Council of AAUP Chapters; the Professional Staff Congress of CUNY, AAUP/AFT; the Connecticut State University AAUP; the Professional Staff Association/AAUP of NJIT; Western Michigan University AAUP; California Faculty Association, AAUP/NEA; and the Congress of Connecticut Community Colleges AAUP hereby move for leave to file their brief *amicus curiae* in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit. The Petitioner has consented to this filing; the Respondents have not consented.

The grounds for this motion are:

THE INTERESTS OF THE MOVANTS

The Rutgers Council of AAUP Chapters represents faculty members for purposes of collective negotiations at Rutgers, the State University. It is affiliated with the *American Association of University Professors. In both capacities the Rutgers AAUP is dedicated to the preservation of academic freedom.

Academic freedom may thrive only where there is academic tenure, to protect faculty members from discharge by whimsical governing bodies. The promise not to fire professors except for specified causes guarantees that they will engage in teaching, research and other professional and personal activities without fear lest their speech or their conduct serve as a reason for dismissal. Rutgers AAUP believes that faculty members with unpopular views and unpleasant personalities must be

given room to flourish, so that the pall of orthodoxy does not choke off their teaching and scholarship.

Fundamental to the need to provide faculty members with the broadest possible arena for exercise of their ideas is clarity about the boundaries of permissible conduct. This protects professors directly, because they may regulate their conduct according to announced standards and indirectly, because administrators will be barred from arbitrary or biassed use of the standards.

The movants Professional Staff Congress of CUNY, AAUP/AFT; Connecticut State University AAUP; the Professional Staff Association/AAUP of NJIT; Western Michigan University AAUP; California Faculty Association, AAUP/NEA; and Congress of Connecticut Community Colleges AAUP all represent faculty members for purposes of collective bargaining at their respective institutions of higher education, namely, City University of New York, Connecticut State University, New Jersey Institute of Technology, Western Michigan University, universities in the California State University system, and various community colleges in Connecticut. They share the interests of the Rutgers AAUP in the preservation and promotion of academic freedom.

ARGUMENT TO BE PRESENTED BY THE MOVANTS

This case raises the question whether a professor, required to observe standards of "sound scholarship and competent teaching", received fair warning that his conduct as an employer of other university nonstudent employees could subject him to dismissal. Rutgers AAUP, which represents all faculty members at Rutgers, is uniquely situated to demonstrate the nexus between the historical construction of stated standards for dismissal and the guarantees of academic freedom. The petitioner, who

speaks from his own perspective, has not done so at any length; the respondents, who and which will defend a loose and ahistorical interpretation of the standard, will not do so.

WHEREFORE the Rutgers Council of AAUP Chapters; The Professional Staff Congress of CUNY, AAUP/AFT; the Connecticut State University AAUP; the Professional Staff Association/AAUP of NJIT; Western Michigan University AAUP; California Faculty Association, AAUP/NEA; and the Congress of Connecticut Community Colleges AAUP move for leave to file their brief *amicus curiae*, printed herewith.

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BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

THE INTERESTS OF THE *AMICI CURIAE*

The Rutgers Council of AAUP Chapters[1] consists of three chapter affiliates of the American Association of University Professors (AAUP). The AAUP, formed in 1915, has since that time been dedicated to preserving and advancing academic freedom in our colleges and universities, and to promoting and defending the institution of academic tenure as "the means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive . . . ." *1940 Statement of Principles on Academic Freedom and Tenure*, contained in American Association of University Professors' *Policy Documents and Reports* (1990) (the "Red Book"). The AAUP achieves these goals by developing policy, like the 1940 Statement, which it then persuades institutions to adopt and abide by, and by investigating and censuring institutions that violate academic freedom. W. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex.L.Rev. 1265, 1269 (1988). The Rutgers AAUP Chapters are equally dedicated to these goals, which may be threatened by dismissal standards which may be and are capriciously applied.

The Rutgers AAUP is also the duly recognized collective negotiating agent, that has the right and duty

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1. The Rutgers Council of AAUP Chapters moved in this case to intervene in the U.S. District Court for the District of New Jersey. That motion was denied, but the Rutgers AAUP was granted status in that court as *amicus curiae*.

under state law to represent faculty members' interests in better and more secure working conditions, including enhancement of protections for academic freedom and tenure. These responsibilities complement Rutgers AAUP's role as a professional association. *Statement on Collective Bargaining, Policy Documents and Reports* at 145. The administration of discipline is a central collective negotiation concern. Rutgers AAUP is committed to the protection of tenured faculty members through strict adherence to duly established and published causes for discipline.

The Rutgers AAUP also represents the community of Rutgers scholars, who are dedicated and obligated to seek and state the truth as they see it, as scholars and as members of an academic community. The Rutgers AAUP presents to this court the true account of the history and construction of Rutgers' definition of its causes for dismissal, in fulfillment of that obligation. The Rutgers AAUP finally brings its interests in defending faculty prerogatives, as guaranteed by Rutgers' system of governance, and as fundamental to the role of faculty colleague, to participate in defining standards for faculty conduct.

The *amici*, all AAUP affiliates and collective bargaining representatives, are equally interested in the presentation of academic freedom through fair notice to tenured faculty members of what behavior on their part may subject them to the capital punishment of dismissal. The opinion of the Third Circuit threatens to create chaos and confusion in their own institutions, since if may be read as an invitation to administrators to loosen and broaden retroactively their announced dismissal standards.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD DECIDE WHETHER THE INTERPRETATION OF RUTGERS' RULES BY THE COURT OF APPEALS MAKES THEM SO VAGUE AS TO THREATEN ACADEMIC FREEDOM

At least since 1916, the AAUP has believed, in a departure from European tradition, that academic freedom necessarily encompassed the faculty member's liberty to engage in speech and conduct outside the classroom. Since then, when the AAUP began to investigate claims of violations, its "academic freedom docket has been dominated by extramural freedom cases. Of these cases, conflicts over parochial prides and precedence, and charges of hierarchic insubordination and coworker friction, have far outnumbered disputes involving the content of teaching or research." Metzger, *Definitions of Academic Freedom*, *supra*, 66 Tex.L.Rev. at 1275; W. Metzger, *Academic Freedom in the Age of the University* (1961)[2] at 206-207.

We seldom now see a full frontal assault by higher education administrators on the extramural conduct of professors. The AAUP receives, instead, complaints that academic freedom is threatened when faculty members are terminated because they are outspoken outside the classroom about institutional governance or because they

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2. Originally published as Part Two of R. Hofstader and W. Metzger, The Development of Academic Freedom in the United States (1955).

engage in conduct outside the academy which its governors deem repugnant.[3]

The Rutgers AAUP does not quarrel with the proposition that, had it wished to do so, the Rutgers Board of Governors could have adopted regulations governing extramural conduct (other than conviction of a crime involving moral turpitude), and subjecting professors to discharge for violations of the rules. Those regulations,

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3. See, e.g., Reports of Committee A (Academic Freedom) Contained in Academe (Bulletin of the American Association of University Professors), Vol. 77, No. 1 (Jan.-Feb. 1991) at 34 (nonrenewal growing out of dispute over royalty rights to patent for invention developed by faculty member); Vol. 76, No. 1 (Jan.-Feb. 1990) at 67 (nonrenewal after dispute over criticism by faculty member of departmental disharmony); Vol. 75, No. 6 (Nov.-Dec. 1989) at 34 (failure to reappoint because of alleged disagreeable communications and lack of spirit of cooperation alleged to be discrimination on the basis of sex); Vol. 75, No. 3 (May-June 1989) at 35 (refusal to recognize tenure by length of service acquired by faculty member active and outspoken in affairs of professional organization); Vol. 74, No. 3 (May-June 1988) at 29 (nonrenewal because faculty member sent letter to student newspaper criticizing colleague who sued another colleague for sexual harassment), at 41 (faculty member dismissed after administration perceived her criticisms of college governance disruptive and disparaging of the president); Vol. 76, No. 4 (July-Aug. 1990) at 50 (termination after faculty member refused to sign statement solemnly promising to cease criticisms of administrators); Vol. 73, No. 5 (Sept.-Oct. 1987) at 48 (professor fired by Catholic institution after she remarried, her first marriage having ended in civil divorce).

had they existed, would have alerted the Rutgers faculty that their voluntary conduct outside the classroom and the laboratory, even though not resulting in criminal conviction, could result in the civil penalty of dismissal from their tenured jobs.

If those regulations had existed, and if their scope had reached either conduct protected by academic freedom or conduct not reasonably related to the role of faculty members, the Rutgers AAUP or other interested parties could have challenged them as overbroad. The Rutgers AAUP would have insisted that there be a close connection between the forbidden and offensive conduct and the fitness to be a scholar and a teacher.

This insistence would have been based upon the AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure*, contained in the Red Book at 21-30. The Recommended Dismissal Procedures, at 26; state first:

> (a) Adequate cause for dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.

At Rutgers, however, faculty members rested secure based upon Rutgers' interpretations, before the decision of the United States Court of Appeals for the Third Circuit. Faculty members knew that they could only be

dismissed for violating the four grounds for discharge specified in University Regulations including (1) incompetence, (2) incapacity, (3) conviction of a crime involving moral turpitude, or (4) failure to maintain "standards of sound scholarship and competent teaching". Regulation 3.97 quoted at 9a (Petitioner's Appendix). They also believed that although their employment imposed upon them "obligations of frankness, candor and cooperation. . . with the administration," the Board of Governors had interpreted Regulation 3.97 as giving no warning that failure to adhere to the ethical code of Regulation 3.91 or failure to be truthful could lead to dismissal. Faculty members knew that the Board of Governors refused to dismiss their colleague, Prof. Villiers, even though he had a secret full-time teaching job at another institution, in violation of several express and implied responsibilities elsewhere in University policies. Faculty members knew that the Governors had found in 1979 that Prof. Villiers had no notice from Regulation 3.97 that his lack of candor about his job, or even his dual full-time employment, constituted a dismissable offense. 3dA 386-88.[4]

Faculty members also knew that another colleague, Prof. Russell Leaf, had been charged with neglect of his duties to teach, do scholarship and serve his university, in that he allegedly failed to schedule or meet classes, to hold office hours, to collect and read his mail, to conduct any research at all, to be available for collaboration or consultation with colleagues, or to attend departmental meetings and colloquia. 3dA 398-99. Yet, based on the *In re Villiers* decision of the Board of Governors, faculty members knew that the administration in 1980 had

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4. This refers to the Joint Appendix submitted to the U.S. Court of Appeals for the Third Circuit.

declined to proceed with the charges against Prof. Leaf. 3dA 404. Faculty members had reason to know that the standards set forth in Regulation 3.97 gave no notice that even gross neglect of all university duties -- even those explicitly touching on teaching or scholarship -- could subject colleagues or themselves to dismissal.[5]

Faculty members knew that Regulation 3.97 had been the topic of much debate and controversy, when the Governors contemplated revising the standards and procedures for dismissal. They believed, and they expressed their belief, that current Regulation 3.97 did not (and any new regulation should not) subject one to dismissal for such "vague" offenses as "failure to maintain professional conduct" or "conduct exhibiting neglect of university obligations or responsibilities." 3dA 291-342; 54a-56a. Faculty members knew that draft causes for dismissal or lesser discipline including "persistent or recurrent failure to maintain appropriate standards of sound scholarship and adequate teaching, gross neglect of established conditions appropriate to the appointment, gross disregard of Regulations and other written policies of the University, or conviction of a crime that involves moral turpitude and that reflects adversely upon fitness to serve as faculty members" had been proposed to the Governors in 1987, but not adopted by them. 3dA 342. Faculty members were aware that the 1975 version of

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5. The original charges against Prof. Leaf were predicated in part on Regulation 3.91, the ethical code which the Third Circuit and the District Court found in this case had not been incorporated into Regulation 3.97. However, no new charges were pressed predicated on the failure to maintain standards of sound scholarship and competent teaching.

Regulation 3.97, as construed by the Board of Governors, enunciated the sole bases for dismissal.

The Petitioner here, Prof. San Filippo, has challenged Regulation 3.97's fourth cause for dismissal, failure to maintain standards of sound scholarship and competent teaching, as void for vagueness as applied to his conduct. He claimed that it did not give him and his colleagues "fair warning" that the acts with which he was charged could result in dismissal by Rutgers. As the Court of Appeals below explained, to survive a challenge of vagueness, the rule or statute must be "sufficiently explicit" to alert people of the conduct that "will render them liable to its penalties:"

> And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

San Filippo v. Bongiovanni, 961 F.2d 1125, 1136 (3d Cir. 1992) reprinted at 27a, quoting from *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

In *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974) this court found that the standards for dismissal from federal employment of "such cause as will promote the efficiency of the service" in 5 U.S.C. §7501(a) was not unconstitutionally vague. The court did not find that "reasonable men" would not differ on whether particular conduct, such as Mr. Kennedy's alleged defamation of his

colleagues, was not included in the standard. Rather, the court found that the standards were defined by history. The phrase "was not written on a clean slate in 1912," when it was enacted, and it did "not appear upon a clean slate" in 1974. Authoritative interpretations by the administrative body enforcing the statute, the Civil Service Commission, gave meaning to, and dispelled vagueness from, the standard. 416 U.S. at 160. The Commission interpreted the standard by incorporating wholesale "longstanding principles of [private sector] employer-employee relationships" into the standard. This incorporation required a reading of the catchall provisions in §7501(a) to permit dismissal for "'inveigh[ing] against [one's] superiors in public with intemperate and defamatory'" matter. (Inserts added.)

> [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected . . . as to chill . . . freedom to engage in appropriate speech. (Inserts and ellipses in original.)

416 U.S. 161-62, quoting from *Meehan v. Macy*, 392 F.2d 822, 835 (D.C. Cir. 1968), modified 425 F.2d 469, aff'd *en banc* 425 F.2d 472 (1969).

In this case, the Third Circuit turned *Arnett v. Kennedy* on its head. The court below ignored the slate upon which the Rutgers administration had clearly written a limiting history, when the administration concluded in *In re Villiers* that Regulation 3.97 did not incorporate either any general "longstanding principles of employer-employee relations" and "common sense" or any specific standards for behavior set forth elsewhere in university policies,

including the ethical guidelines of Regulation 3.91. The Court of Appeals then engrafted a "common sense" reading to make virtually universal and all-inclusive the specific and limited terms of Regulation 3.97, even though, in stark contrast with the federal government in *Arnett*, Rutgers had expressly declined to read its own regulation to proscribe all manner of conduct touching on all aspects of professional and personal responsibility, however far removed from the pure intramural exercises of teaching and scholarship.

Petitioner has explained why under *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2731 (1991), the terms "sound scholarship" and "competent teaching" fail to alert faculty members to Rutgers' limits of tolerance, since the terms of degree historically at Rutgers lack "settled usage or tradition of interpretation" to save them from vagueness. Petition at 25. Petitioner does not expand on the other two harms arising from a vague regulation: the impermissible delegation of unfettered discretion to the enforcer, and the chilling effect on those regulated. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972). Both threaten the professorate with a "pall of orthodoxy" at a time when scholars attempt diligently to explore the very bounds of academic freedom. *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 603 (1967).

The faculty at Rutgers and other institutions of higher education are now engaged in spirited debate over what constitutes sound scholarship and competent teaching. The strident tones of the struggle over what should constitute the canon of a particular discipline, or whether there should even be such a canon, resonate throughout the academy and even outside it. *See, for example*, these pieces in *The Chronicle of Higher*

Education: Jay, Gregory S., *The First Round of the Culture Wars*, February 26, 1992 at B1-2; Heller, Scott, *'Common Knowledge': New Journal Aims to Build Bridges in a Fractured Academic World*, January 29, 1992 at A10; McMillen, Liz, *Olin Fund Gives Millions to Conservative Activities in Higher Education*, January 22, 1992 at A31-A32; Ellis, John M., *The Origins of PC*, January 15, 1992 at B1-2; O'Neill, Robert M., *Dealing with Intolerance for Intolerant Views*, December 18, 1991 at A44; Heller, Scott, *'Frame-Up' of Multicultural Movement Dissected by Scholars and Journalists*, November 27 ,1991 at A16-18; Haro, Robert P., *So-Called Experts on Cultural Diversity Need to Be Subjected to Careful Scrutiny*, November 13, 1991; Magner, Denise K., *Gathering to Assess Battle Against 'Political Correctness', 'Scholars' Look for New Ways to Resist 'Illiberal Radicals'*, October 30, 1991 at A17-19; Magner, Denise K., *Ideological Foes in 'PC' Debates Open a Dialogue*, October 2, 1991 at A17-18; and these pieces in *Academe*: Stimpson, Catherine R., *Meno's Boy: Hearing His Story & His Sister's*, Vol. 77, No. 6, Nov.-Dec. 1991 at 25-31; and Davidson, Cathy N., *'PH' Stands for Political Hypocrisy*, Vol. 77, No. 5, Sept.-Oct. 1991, at 8-14. These fierce battles have not resolved and are not likely soon to resolve what shall be taught. The nature of what scholars recognize as truth constantly evolves as they engage in traditional and new scholarly methods to achieve new and better understandings.

All partisans in the wars may be unable to wait until there is consensus about the curriculum and other issues before they try to undermine the strongholds of their opponents on their own campuses. A direct attack on scholarship or teaching is risky while there is violent disagreement about what is "sound" and what is unsound. How tempting and how much easier to rid an institution of the pesky opposing adherents by setting upon their

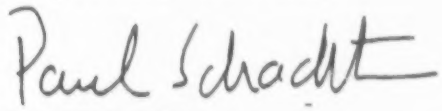
nonspeech conduct as citizens of the university community, outside the classroom, laboratory and library, and claiming that the undesirable colleagues thereby maintain unsound scholarship and incompetent teaching. The Court of Appeals invites this precise abuse, permitting administrators and colleagues to fashion novel types of unsound scholarship and incompetent teaching, based on the known sins of each targeted professor. Did he fail to pay his university parking tickets? Did she fail to return books and periodicals on time to the library? Did he overwork a nonstudent employee? Did she show disrespect for an administrator? Under the Third Circuit's reading, each of these might be deemed to "spring from his [or her] role as a faculty member at the University," and despite their irrelevance to "actual teaching or research skills", may therefore serve as the basis for dismissal. 961 F.2d at 1137; 29a.

Faculty members now fear that whatever the words of Regulation 3.97 say, and whatever the tradition of interpretation of the Regulation at Rutgers, administrators and colleagues may label all manner of conduct -- even conduct outside the academy -- as unsound scholarship and incompetent teaching. They will reason, as this court has done in the past, that this unlimited discretion will subject them to unpredictable attack: they cannot regulate their behavior precisely because neither they, nor anyone else, knows the contours of the standard. It takes little imagination to guess how "conscientious" faculty members will act, to observe their obligations and to preserve their employment "by restricting their conduct to that which is unquestionably safe" from direct or collateral attack. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The robust debate over the role and content and "competent teaching" of higher education that now flourishes is in grave danger of extinction, if "sound scholarship" and "competent teaching" may be defined *ad hoc* and may include conduct as an employee and supervisor, even though not as a teacher or scholar.

CONCLUSION

The Court should grant the writ to decide whether the vagueness doctrine was properly applied and whether the Court of Appeals correctly reversed the order granting partial summary judgment to the petitioner.

Respectfully submitted,



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Dated: September 4, 1992